

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 August 2006

BALCA Case No.: 2005-INA-120
ETA Case No.: P2004-NJ-02506709

In the Matter of:

RIO CAFÉ RESTAURANT
a/k/a GLORIANA, INC., d/b/a RIO CAFÉ RESTAURANT
Employer

on behalf of

CHARLES DA SILVA COSTA,
Alien

Certifying Officer: Dolores DeHaan
New York, New York

Appearance: Gloria E. Carvalho, Owner¹
Pro Se for the Employer

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal

¹ Although "Cassandre Lamarre, Esq." is named on the Application for Alien Employment Certification as agent for the Employer and the Alien, the application was co-signed by Gloria E. Carvalho, Employer's Owner (AF 64). Furthermore, the rebuttal and Request for Review were filed by Ms. Carvalho (AF 26-27, 1).

Regulations (“C.F.R.”).² We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On December 6, 2001, the Employer, Gloriana, Inc., d/b/a Rio Café Restaurant, filed an application for labor certification to enable the Alien, Charles Costa, to fill the position of “Cook,” which was classified by the Job Service as “Cook, Portuguese” (AF 63). The Employer set forth a basic pay rate of \$15.00 per hour and a 40-hour work week from 2:00 p.m. to 10:00 p.m. (AF 64, Items 10-12). The Employer required two years of experience in the job offered (AF 63, Item 14). The application was submitted under the reduction in recruitment (“RIR”) process (AF 74).

On October 7, 2004, the CO issued a Notice of Findings ("NOF"), in which she approved the Employer's request for RIR processing, but proposed to deny certification on multiple grounds. First, the CO questioned whether Rio Café Restaurant meets the regulatory definition of “Employer” under section 656.3, noting that the record was ambiguous regarding the existence and/or location(s) of the restaurant, as well as its relationship to Gloriana Inc. and/or other restaurants associated with the corporate name. Secondly, the CO stated that the Employer had not established that the job-opportunity meets the definition of “Employment” as set forth in section 656.3, since the Employer did not document that there is bona fide, permanent, full-time year-round work for an employee other than oneself; nor did the Employer document that the job opportunity has been and is clearly open to any qualified U.S. worker under section 656.20(c)(8). Thirdly, the CO questioned whether the Alien met the stated experience requirement at the time he was hired by the Employer and/or whether it is feasible to hire workers with less training and/or experience pursuant to section 656.21(b)(5). (AF 42-44). The Employer submitted its rebuttal on or about November 2, 2004 (AF 26-41).

² This application was filed prior to the effective date of the “PERM” regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

In the Final Determination, dated November 29, 2004, the CO concluded that the rebuttal clarified the issue of the restaurant's existence and location, and, therefore, it is an "Employer," as defined in section §656.3. Moreover, the CO determined that the Employer had also satisfactorily rebutted the section 656.21(b)(5) issue. However, the CO denied certification on the basis of the Employer's failure to document that a bona fide, permanent full-time job exists for a Portuguese specialty cook (AF 24-25). On December 15, 2004, the Employer requested a review of the denial (AF 1-23). Subsequently, this matter was forwarded to the Board of Alien Labor Certification Appeals. On April 20, 2005, we issued a Notice of Docketing and Order Requiring Statement of Position or Legal Brief. Although Employer did not respond thereto, the grounds for the appeal are set forth in the request for review. Accordingly, we will consider this case on its merits.

DISCUSSION

In the NOF, the CO cited applicable regulations, as set forth above, and stated, in pertinent part:

Employer must also document the number of workers it has had in 2001, 2002, 2003 and currently, their names and job duties, whether full or part-time, employee or non-employee....and submit signed copies of his [sic] Federal tax returns for 2001, 2002 and 2003.

(AF 43).

The Employer's rebuttal consisted of a letter, dated November 2, 2004, signed by its owner, Gloria E. Carvalho (AF 26-27), Rio Café's retail food license (AF 29), a sanitary inspection report (AF 30), a Certificate of Inspection (AF 31), Retail Consumption Licenses (AF 32, 34), various W-2 forms (AF 35-38), and an "Experience Letter" and translation thereof correcting the description of Alien's duties while working at "Restaurante Tropical Brasil" (AF 39-40).

In the Final Determination, the CO denied certification, stating in pertinent part:

The NOF asked employer to document, pursuant to 20 CFR 656.3 DEFINITIONS “employment” and 656.20(c)(8) that she can guarantee permanent full-time work by an employee for an employer other than oneself and that the job opportunity has been and is clearly open to any qualified U.S. worker. The employer was asked to document the number of workers it has had in 2001, 2002 and 2003 and currently, their names and job duties, whether full- or part-time, employee or non-employee and to furnish signed copies of its federal tax returns for 2001, 2002 and 2003.

Although the rebuttal includes the requested list of workers, their names, job duties and indicates employee or non-employee, it does not state whether they were full or part-time employees. Employer also failed to submit signed copies of the Federal tax returns for the requested years.

Since the employer failed to submit documentation to show that a bona fide permanent full-time job exists for a Portuguese specialty cook, the case is denied.

(AF 25).

In her “Request for Review” letter, dated December 15, 2004, Ms. Carvalho belatedly stated: “All my employees are full-time workers.” Furthermore, Employer also belatedly submitted signed copies of the Federal tax returns for 2001, 2002, and 2003 (AF 2-14).³ However, it is well settled that evidence submitted after the issuance of the Final Determination together with the request for review cannot be considered on appeal pursuant to 20 C.F.R. §656.27(c). *See, e.g., Memorial Granite*, 1994-INA-66 (Dec. 23, 1994); *ST Systems, Inc.*, 1992-INA-279 (Sep. 2, 1993); *HGHB*, 1992-INA-267 (June 3, 1993).

As outlined above, the CO reasonably requested relevant information in the NOF in order to ascertain whether there is a bona fide permanent full-time job opportunity for the position of Portuguese Cook within the setting of the Employer’s business, and to document that such a job opportunity, if it truly exists, is clearly open to qualified U.S. workers. As stated by the CO, despite detailed instructions in the NOF, the Employer’s rebuttal did not specify whether its

³ In the Request for Review, Ms. Carvalho seems to suggest that she sent unsigned copies of the tax returns with her rebuttal (AF 1). However, the rebuttal, as provided in the Appeal File, did not include signed or unsigned copies of the tax returns (AF 26-41). Moreover, tax returns were not listed among the various documents which Ms. Carvalho had reportedly “attached” to the rebuttal letter (AF 26-27).

workers were full- or part-time. Moreover, Employer failed to provide signed copies of its Federal tax returns for 2001, 2002, and 2003.

The Board has consistently held that a petitioning employer must provide directly relevant and reasonably obtainable documentation requested by a CO. *See, e.g., Gencorp*, 1987-INA-659 (Jan. 13, 1988)(en banc); *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991); *Bob's Chevron*, 1993-INA-498 (May 31, 1994). Since the Employer has failed to provide such documentation, we find that labor certification was properly denied.⁴

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk

⁴ Finally, even if Employer had provided a timely statement that all of its employees were “full-time workers,” as was belatedly stated in the Request for Review (AF 1), such a statement is undermined by the earnings of each of the relevant employees, as reported on their W-2 forms. In 2001, Employer did not have any employees who worked exclusively as cooks. In 2002, Employer reportedly had three employees who worked exclusively as cooks (Maldonado, Pereira, and Vazquez). In 2003, Employer only had one employee who worked exclusively as a cook (Maldonado). Finally, the then current (2004) employment roster also consisted of one employee who worked exclusively as a cook (Da Silva) (*See* AF 26-27). The relevant W-2 forms, which were submitted in the rebuttal, reveal the following earnings: Maldonado (2002) = \$6250; Pereira (2002) = \$1500; Vazquez (2002) = \$1284; and, Maldonado (2003) = \$13000 (AF 36-38). Based on the stated basic pay rate of \$15.00 per hour for 40 hours (AF 63), a *full-time* Portuguese Cook would have an annual income of \$31,200.00.

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Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.